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No. 9707

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARRIE GATES, CHARLES ELMER GATES and LLOYD GATES, by his guardian, Carrie Gates, *Appellants,* vs. GENERAL CASUALTY COMPANY OF AMERICA (a corporation), *Appellee.*	}

BRIEF FOR APPELLEE.

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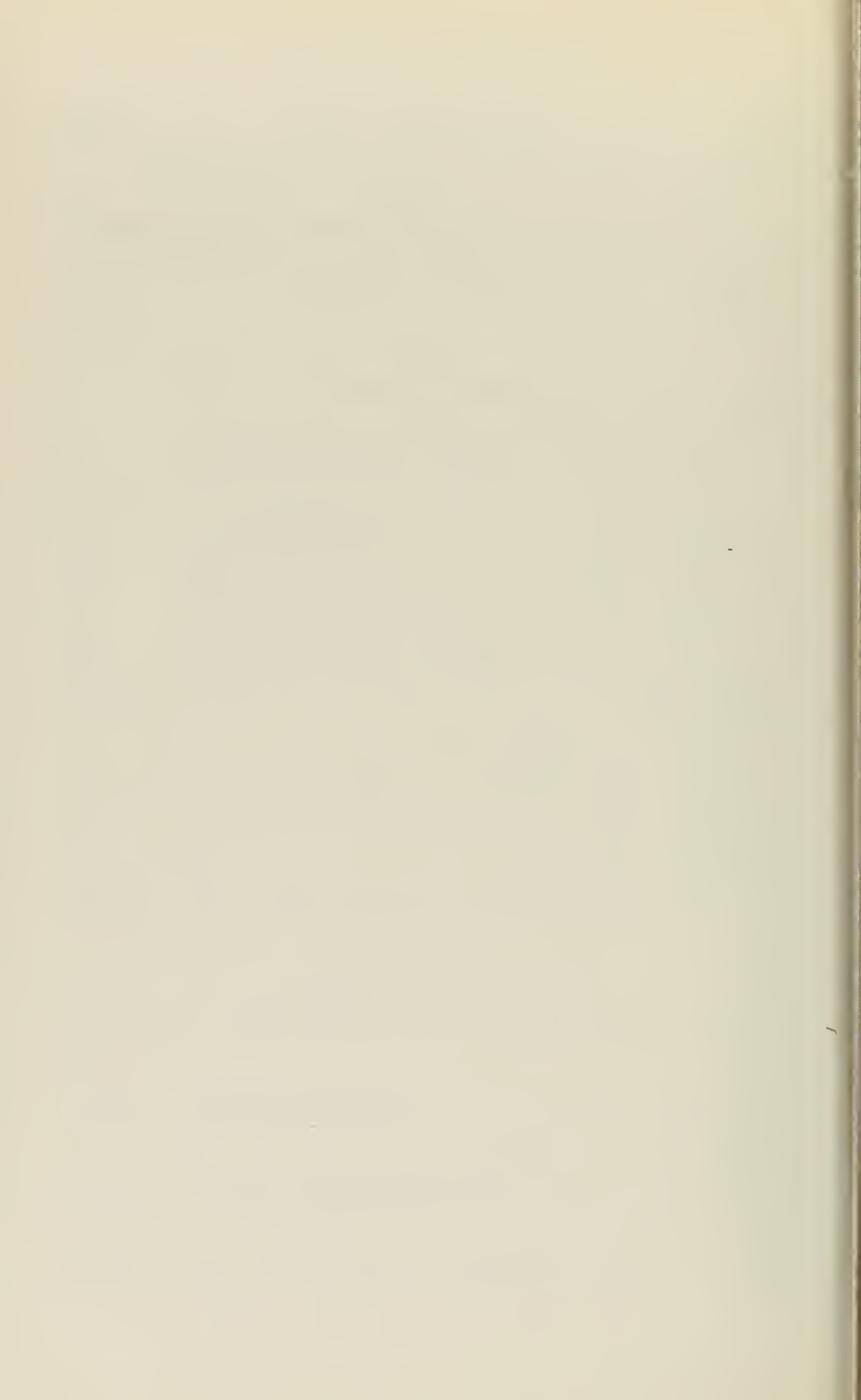

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Appellants,

vs.

General Casualty Company of America (a corporation),

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The appellee does not controvert the statement of jurisdiction contained in appellants' opening brief. (App. Op. Bf. pp. 1-2.)

The complaint was originally filed in the Superior Court of the State of California in and for the County of Fresno. (Tr. pp. 2-5.) It stated a cause of action to recover the sum of $5000, interest, and costs, upon a policy of automobile liability insurance issued by defendant. (Tr. pp. 2-3.) A verified petition to remove the cause to the District Court of the United States for the Northern Division of the Southern

District of California was filed by the defendant. (Tr. pp. 6-9.) This petition alleged that plaintiffs were residents and citizens of the state of California; that defendant was a nonresident of the state of California, a resident of the state of Washington, and a Washington corporation; and that the matter in controversy exceeded, exclusive of interest and costs, the sum or value of $3000. (Tr. p. 7.) The Superior Court granted the petition, approved the removal bond, and the cause was removed to the said District Court. (Tr. pp. 10-11.) The removal proceedings are sustained by the Judicial Code, section 28, amended. (28 U.S.C.A., sec. 71.) Jurisdiction of the District Court is therefore sustained by the Judicial Code, section 24, amended. (28 U.S.C.A., sec. 41.)

The final judgment of the District Court was entered on July 15, 1940. (Tr. pp. 23-24.) Timely notice of appeal was filed October 14, 1940. (Tr. pp. 25-26.) Jurisdiction of this court upon appeal to review the said judgment of the District Court is therefore sustained by the Judicial Code, section 128, amended. (28 U.S.C.A., sec. 225.)

STATEMENT OF THE CASE.

Appellants conclude their statement of the case with the claim that they have set forth the evidence "in the light most favorable to the appellee". (App. Op. Bf. p. 6.) The appellee controverts the statement of the case presented by appellants. The appellee therefore makes its own statement of the case.

Late in April or early in May, 1934, the R. O. Deacon Lumber Company, a corporation doing business in Kings County, California, made application to John Drenth, an insurance broker in San Francisco, to place public liability and property damage insurance on a fleet of trucks used in the business of the applicant. (Tr. p. 55.) The applicant informed Drenth that it was uninsured because the Madison Insurance Company, which had been carrying the insurance, had gone into liquidation. (Tr. p. 55.)

Drenth was an experienced broker, and his experience had taught him that where trucks were concerned it was very hard to place insurance of the type sought. (Tr. p. 55.) He asked the appellee to issue a policy of public liability and property damage insurance to his principal. (Tr. p. 27.) He talked with Mr. Sturgess who supervised the underwriting for appellee (Tr. pp. 26-27), and he also talked with Mr. Haney who was the chief underwriter for appellee. (Tr. pp. 39-40.) Both told him that the appellee would issue a policy if it was satisfied with the principal's record in former years. (Tr. pp. 27, 40.) Both asked Drenth for the names of former insurance carriers on the line together with information as to the number and character of liability and property damage claims during three or four years past. (Tr. pp. 27, 35, 40, 45.)

Drenth stated to Sturgess and Haney that he would procure the desired information from his principal. (Tr. pp. 36, 40.) He also stated that the information he had showed that the Maryland Casualty Company

and the Madison Insurance Company were the former carriers on the line and that their loss records were small. (Tr. p. 27.)

Under date of May 3, 1934, Drenth wrote to his principal asking for the information desired by appellee's specific inquiry, but confining the time to "the past year". (Tr. p. 59.) Under date of May 5, 1934, the principal answered this letter, mentioning the Maryland Casualty Company and the Madison Insurance Company and referring to an accident "of small consequence" in December, 1933, while the latter company was carrying the line. (Tr. pp. 33-34.) The principal also referred to an experience of the Maryland Casualty Company with collision insurance—a type of insurance for which the principal was not applying. (Tr. p. 34.) Upon receipt of this information from his principal Drenth told the appellee that for several years previous the carriers of the line had been the two companies mentioned. (Tr. pp. 27-28.)

Before accepting the risk, appellee communicated with the Maryland Casualty Company as to its experience with the public liability and property damage insurance and received confirmation of Drenth's statement that the loss record of that company was small. (Tr. pp. 45-46.) The appellee was not interested in other types of insurance which the Maryland may have written and no check was made concerning any experience of the Maryland with collision insurance. (Tr. p. 46.) Information from the Madison Insurance Company was not available. (Tr. p. 43.)

Acting upon the information thus received from the principal and his agent (Tr. p. 28), the appellee, as insurer, insured the fleet of trucks, and issued the policy in suit to R. O. Deacon Lumber Company, as insured, on June 2, 1934. Coverage thereunder was confined to two types of insurance: 1. Public liability insurance, that is, indemnity against liability of the insured to others for bodily injuries or death; 2. Property damage insurance, that is, indemnity against liability of the insured for damage to property of others. Coverage thereunder did not extend to collision insurance, that is, protection to the insured against damage to its own vehicles resulting from impact with other objects.

When the policy was issued the insured paid part of the premium and undertook the payment of the balance in monthly installments. (Tr. pp. 31-32.) The deferred balance was evidenced by a promissory note executed by the insured. (Tr. p. 32.)

One of the trucks insured under the policy was involved in an accident on September 20, 1934, and the death of one Elmer Gates was thereby caused. (Tr. pp. 18-19.)

This accident was reported to the appellee, and it entrusted the investigation thereof to H. H. Munroe, an employee in its claims department. (Tr. pp. 50-51.) During his investigation Munroe was informed in Fresno County that the Metropolitan Casualty Company had formerly carried the public liability and property damage insurance on the fleet of trucks. (Tr. p. 51.)

When he returned to San Francisco in the early part of October, 1934, Munroe communicated with the Metropolitan Casualty Company, examined its records, and ascertained its experience with the line. (Tr. pp. 51-52.) He discovered that the Metropolitan had been a former carrier of the line and had encountered numerous liability and property damage claims against the R. O. Deacon Lumber Company. (Tr. pp. 51-52.) He reported to appellee that the Metropolitan had been a former carrier of the line with an unsatisfactory experience, both as to frequency of claims as well as the total amount of claims paid. (Tr. p. 28.)

Based upon the information thus discovered by Munroe the appellee rescinded the insurance on October 5, 1934 (Tr. pp. 29-30), and returned to the R. O. Deacon Lumber Company the part of the premium paid and the note evidencing the unpaid balance of the premium. (Tr. pp. 31-32.)

Nearly a month after the insurance was thus rescinded the heirs of Elmer Gates (appellants herein) brought action against the R. O. Deacon Lumber Company to recover damages for the wrongful death of said Elmer Gates. (Tr. p. 19.) Judgment was entered in their favor on November 20, 1936, for the sum of $5000, interest, and costs, and the judgment became final on August 27, 1938. (Tr. p. 19.)

With the said judgment forming the basis, the present action was commenced by appellants (as plaintiffs) on May 23, 1939, to recover on the said policy of insurance issued by appellee on June 2,

1934, and rescinded on October 5, 1934. (Tr. pp. 2-5.) The appellee (as defendant) defended on the ground that the issuance of the policy had been procured through fraudulent misrepresentations and concealment on the part of the insured and that after discovery of the fraud the insurance had been promptly rescinded. (Tr. pp. 13-15.) The trial court sustained this defense (Tr. pp. 20-21), and judgment was accordingly entered for defendant. (Tr. pp. 23-24.)

A procedural question is suggested by the manner in which the appellants are presenting their appeal. Under Rule 19 (6) of this court the appellants filed a statement of the points to be relied upon on appeal with reference to the printing of the record on appeal. (Tr. p. 90.) It was said by this court in *Sampsell v. Anches,* 108 F. 2d 945, at page 948, that a "statement of points" by an appellant is a limitation upon the number and character of the specifications of error in his brief, and that the court "will consider nothing but the 'points to be considered on appeal' as stated in the direction to the clerk of this court to print the record". Four points were stated by appellants in their direction to the clerk of this court to print the record. (Tr. pp. 89-90.) Six specifications of error are contained in their opening brief. (App. Op. Bf. pp. 6-7.)

The specifications of error now made in the brief call upon the court to consider points which were not stated in the direction to the clerk to print the record. For example, in their statement of the first point

relied upon the appellants merely challenged the sufficiency of the evidence to support "the findings of fraudulent misrepresentation and concealment by the insured *with respect to its losses on public liability and property damage claims during the time prior to its application for the policy issued by appellee*". (Tr. p. 90.) (Emphasis added.) In Specification of Error No. 2 the stated point is elaborated into a challenge that "the evidence is insufficient to support the finding that the R. O. Deacon Lumber Company fraudulently misrepresented the facts to defendant, and fraudulently concealed the fact that for a period of time prior to the issuance of defendant's policy the R. O. Deacon Lumber Company was insured with the Metropolitan Casualty Company, and that during said time several serious liability claims for personal injuries and a number of property damage claims were made against said R. O. Deacon Lumber Company, resulting in substantial losses to said Metropolitan Casualty Company". (App. Op. Bf. p. 6.)

In their statement of the second point to be relied upon the appellants challenged *the failure* of the trial court to find that appellee "at the time the policy was issued, had knowledge sufficient to put a prudent person upon an inquiry which, if pursued with reasonable diligence, would have resulted in the discovery of all of the facts which the court found to have been misrepresented and concealed". (Tr. p. 90.) No specification of error in the brief is addressed to any error of the trial court in failing to make said finding or any other finding. It is true that appellants'

Specification of Error No. 1 (App. Op. Bf. p. 6) questions the sufficiency of the evidence to support the finding that the appellee first learned in October, 1934, that statements and information furnished by the R. O. Deacon Lumber Company in response to inquiry, were incorrect and incomplete. But it is equally true that the "points to be considered on appeal" as stated in the direction to the clerk of this court to print the record (Tr. pp. 90-91) contained no intimation that the finding in such respect was being attacked or that the point now urged in Specification of Error No. 1 would be relied upon on the appeal.

In their statement of the third point to be relied upon the appellants challenged "the *conclusion of law* that the defendant duly and regularly rescinded the policy of insurance, whereby said contract of insurance was extinguished". (Tr. p. 91.) (Emphasis added.) The same point is substantially covered by Specification of Error No. 5. (App. Op. Bf. p. 7.) Nowhere in their statement of points did the appellants challenge any finding of fact respecting rescission. (Tr. pp. 90-91.) The point is brought into the case for the first time by Specification of Error No. 4. (App. Op. Bf. p. 7.)

The statement of appellants' fourth point was "that the evidence is contrary to and fails to support the judgment *in the foregoing particulars*". (Tr. p. 91.) (Emphasis added.) Specification of Error No. 6 enlarges the point to a contention "that the evidence is insufficient to support the judgment". (App. Op. Bf. p. 7.)

Specification of Error No. 3 remains for comment. It reads: "That the evidence is insufficient to support the finding that, had said information been furnished defendant in response to its inquiry prior to the issuance of said policy, defendant would not have issued or delivered said policy to said R. O. Deacon Lumber Company". (App. Op. Bf. pp. 6-7.) Reference to the "points to be considered on appeal" as stated in the direction to the clerk of this court to print the record (Tr. pp. 90-91) discloses no intimation whatever that the point now made in Specification of Error No. 3 would be raised on appeal.

And finally, in connection with the procedural question under discussion, it cannot be said that the appellants have complied with Rule 20 (2-d) of this court regarding specifications of error. The rule requires that *"where findings are made, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous"*. (Emphasis added.) It is clear that the appellants have couched their specifications of error in generalities although the said rule requires particularization.

ARGUMENT OF THE CASE.

A. SUMMARY.

The trial court found: 1. Prior to the issuance of the policy the insured was guilty of fraudulent misrepresentations and concealment (Tr. pp. 20-21); 2. The fraudulent misrepresentations and concealment by the insured induced the appellee to issue

the policy (Tr. pp. 20-21); 3. The fraudulent misrepresentations and concealment by the insured were first discovered by the appellee in October, 1934 (Tr. p. 20); 4. The appellee immediately rescinded the insurance. (Tr. p. 21.)

The findings in the foregoing respects are supported by substantial evidence. The legal consequence thereof is that the policy of insurance was vitiated as to the insured, R. O. Deacon Lumber Company. If the policy of insurance was vitiated as to the insured, then the appellants could not recover thereon. The judgment is sound in fact and sound in law. Therefore, the judgment of the trial court should be affirmed.

B. POINTS OF FACT AND LAW.

1. THE EVIDENCE SUPPORTS THE FINDING OF FRAUDULENT MISREPRESENTATIONS AND CONCEALMENT BY THE INSURED.

The finding of the trial court on this issue was as follows:

> "Prior to the issuance and delivery of said policy specific inquiry was made of said R. O. Deacon Lumber Company by defendant through the broker or agent for the name of its prior insurance carrier and the number and other available information on liability and property damage claims against said R. O. Deacon Lumber Company preceding the application for the insurance policy from defendant; upon information furnished by said R. O. Deacon Lumber Company through its broker or agent in San Francisco, defendant issued and delivered the said policy; . . . said R. O. Deacon Lumber

Company fraudulently misrepresented the facts to defendant and fraudulently concealed the fact that for a period of time prior to the issuance of defendant's policy said R. O. Deacon Lumber Company was insured with the Metropolitan Casualty Company and during said time several serious liability claims for personal injuries and a number of property damage claims were made against said R. O. Deacon Lumber Company resulting in substantial losses to said Metropolitan Casualty Company, . . ." (Tr. pp. 20-21.)

There is substantial evidence in the record supporting the foregoing finding in every particular.

Before the risk was accepted or the policy issued or delivered the appellee made specific inquiry of the R. O. Deacon Lumber Company through its broker and agent, John Drenth, as to the names of former carriers of the liability and property damage insurance and their experiences as to frequency of claims and severity of losses. These facts were established by the testimony of Mr. Sturgess who supervised underwriting for the appellee (Tr. p. 35), and by the testimony of Mr. Haney who was the chief underwriter for the appellee. (Tr. pp. 39-40.) Drenth relayed the specific inquiry to his principal. (Tr. p. 59.) It is true that he limited the inquiry to "the last year" (Tr. p. 59), but the appellee had no knowledge of such limitation. (Tr. pp. 34-35.)

The policy was issued and delivered by appellee on June 2, 1934, upon the information furnished by the insured through Drenth, its broker and agent. These facts were also established by the testimony

of Mr. Sturgess (Tr. pp. 27-28), and by the testimony of Mr. Haney. (Tr. pp. 40, 44, 46.)

The insured fraudulently misrepresented the facts to the insurer and fraudulently concealed the fact that the Metropolitan Casualty Company had carried the line from November 10, 1931, to November 10, 1933, and had such an unsatisfactory experience with the insured as to frequency of claims and severity of losses that it refused to renew the insurance when the insured applied for renewal in November, 1933.

The testimony shows that early in the negotiations for the policy Drenth told the appellee that his information disclosed that the former carriers on the line were the Maryland Casualty Company and the Madison Insurance Company. (Tr. p. 27.) The testimony also shows that in response to Drenth's letter asking for the record on liability and property claims (Tr. p. 59), the principal mentioned only the Maryland and the Madison. (Tr. pp. 29-30.) The testimony further shows that thereafter Drenth told the appellee that the Maryland and the Madison had been the only carriers on the line for several years previous. (Tr. pp. 27-28.) Without dispute, the testimony shows that the principal never mentioned to its broker or agent the name or experience of the Metropolitan Casualty Company, and that the broker and agent never mentioned to appellee the name or experience of said company. (Tr. pp. 67-70.)

Two representatives of the Metropolitan Casualty Company testified at the trial concerning insurance in that company and the company's experience there-

with. One of these representatives was Mr. Masi who was in charge of claims (Tr. p. 47), and the other was Mr. Swift who investigated and adjusted claims. (Tr. p. 49.) Their testimony established that the Metropolitan had carried the liability and property damage insurance of the R. O. Deacon Lumber Company from November 10, 1931, to November 10, 1933. (Tr. p. 47.) Their testimony established that claims were frequent and that losses ran into many thousands of dollars. (Tr. pp. 48-50.) Their testimony established that on May 10, 1934, the Metropolitan settled a judgment against the R. O. Deacon Lumber Company for a personal injury claim reported by Mr. Deacon on March 23, 1933—the settlement being for $11,875.89, plus an adjusting expense of $1,923.50. (Tr. p. 48.) Their testimony established that on September 29, 1933, the R. O. Deacon Lumber Company reported to the Metropolitan an accident involving six property damage claims (settled for $1245.60) and two potential personal injury claims. (Tr. p. 48.) And their testimony established that the Metropolitan refused to renew the insurance because of bad experience when the R. O. Deacon Lumber Company applied for renewal in November, 1933. (Tr. p. 48.)

Plainly, the record contains substantial evidence that the insured and its agent fraudulently misrepresented the facts concerning former insurance and fraudulently concealed from the appellee the fact that former insurance had been in the Metropolitan Casualty Company which had suffered substantial

losses by reason of liability and property damage claims against said insured. And this is true, of course, even if the range of time be confined to one year preceding the specific inquiry in May, 1934.

Appellants contend, however, that the record in this case is not susceptible to an inference of intent to defraud on the part of the R. O. Deacon Lumber Company. (App. Op. Bf. pp. 28-30.)

The governing rule in California is thus stated in *Telford v. New York Life Ins. Co.*, 9 Cal. 2d 103 (69 Pac. 2d 835), at page 105:

> "A false representation or a concealment of fact whether intentional or unintentional which is material to the risk vitiates the policy. The presence of an intent to deceive is not essential."

This court applied the same rule in *Strangio v. Consolidated Indemnity & Insurance Co.*, 66 F. 2d 331, where it was said at page 336:

> "Under the California statute, quoted above, the failure to disclose to the insurer that an accident had happened authorized the cancellation of the policy, notwithstanding the fact that Strangio Bros. were not guilty of any intentional wrong in not making the disclosure to the insurance company before the policy was issued."

Limiting their arguments to the contents of the letter of May 3, 1934, by Drenth to his principal (Tr. p. 59), and the reply thereto of May 5, 1934 (Tr. pp. 29-30), the appellants first argue that "the principal fact material to the risk" was the statement by the R. O. Deacon Lumber Company that it

"had been refused insurance on account of a bad record of losses". (App. Op. Bf. p. 29.) But in making this argument the appellants are unmindful that the "risk" which appellee contemplated accepting was entirely different from the "risk" concerning which the R. O. Deacon Lumber Company stated that it had been refused insurance. The only application made to the appellee was for a policy of public liability and property damage insurance, that is, indemnity against liability of the insured *to others* for bodily injuries or death or damage to property, whereas the refused insurance referred to by the prospective insured was collision insurance, that is, protection to the insured against damage *to its own vehicles* resulting from impact with other objects.

With reference to concealment, applicable section 2565 of the California Civil Code (now Insurance Code, section 334) provided:

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

And with reference to representation, applicable section 2581 of the California Civil Code (now Insurance Code, section 360) provided:

> "The materiality of a representation is determined by the same rule as the materiality of a concealment."

It would not necessarily follow that if an insured had a bad record with collision insurance his record

with public liability and property damage insurance would be equally bad. Those expert in insurance matters are best qualified to speak authoritatively on the subject. In this case Mr. Haney, an insurance expert, testified that in writing public liability and property damage insurance the appellee was only interested in the experience of former carriers with that type of insurance and hence that no inquiry was made respecting collision insurance. (Tr. p. 46.) As there is substantial evidence in the record showing that the statement concerning collision insurance would have no probable or reasonable influence upon the appellee in writing public liability and property damage insurance, it is idle for appellants to say that the statement was "the principal fact material to the risk". (App. Op. Bf. p. 29.) The issue of materiality presented a question of fact for the solution of the trial court and its finding thereon is conclusive on appeal. (*Shirreffs v. Alta Canyada Corp.*, 8 Cal. App. 2d 742, 748, 48 Pac. 2d 55.)

Another argument of appellants along the same line is that the appellee should have probed the truth of the statement and ascertained its falsity. (App. Op. Bf. p. 29.) An answer to the argument has been furnished by what has just been said. No duty rested on the appellee to probe the truth of a statement it had not sought and which would have have no probable or reasonable influence upon it in writing public liability and property damage insurance.

An intimation in the appellants' opening brief is that the inquiry addressed by Drenth to his principal on May 3, 1934 (Tr. p. 59) would serve to

mystify the principal rather than enlighten it as to the information desired. (App. Op. Bf. p. 29.) It is obvious, however, that the principal had no difficulty in understanding the scope of the inquiry. It understood that the names of all former carriers on the line were sought, for it gave the names of more than one. (Tr. pp. 33-34.) It understood that the inquiry extended to the year 1933, for it gave experiences in the year 1933. (Tr. pp. 33-34.) It could not misunderstand the request in its agent's letter for "the number and any other available information on liability and property claims". (Tr. p. 59.) It knew that the Metropolitan Casualty Company carried the liability and property damage insurance until November, 1933, for it requested the Metropolitan to renew the insurance in that month. (Tr. p. 48.) It knew that a claim under the policy issued by the Metropolitan was still pending at the very time it answered its agent's inquiry, *for a judgment against it arising out of an accident it had reported to the Metropolitan was not settled until May 10, 1934.* (Tr. p. 48.) It knew that a claim under the policy issued by the Metropolitan was made *as late as September 29, 1933,* for on that date it reported an accident giving rise to six property damage claims and two potential personal injury claims. (Tr. p. 48.) Significant, however, is the fact that the R. O. Deacon Lumber Company in attempting to place the insurance after the Madison Insurance Company went into liquidation never mentioned the Metropolitan Casualty Company to Drenth, its own agent. (Tr. pp. 67-70.) It presumably told its agent when first at-

tempting to place the insurance that the Maryland and the Madison had been the only former carriers on the line. (Tr. p. 27.) Likewise significant is the fact that after the agent received the response of his principal (Tr. pp. 33-34) he interpreted the response as meaning that the Maryland and the Madison had been the only carriers on the line and told the appellee that for a period of several years previous the Maryland and the Madison had been the only carriers on the line. (Tr. pp. 27-28.) No comment on this representation by the agent appears in the opening brief for appellants, although it is apparent that a finding of fraudulent misrepresentation could rest thereon.

The record is inevitable in its conclusion that the insured was guilty of concealment. Applicable section 2561 of the California Civil Code (now Insurance Code, section 330) provided:

> "A neglect to communicate that which a party knows, and ought to communicate, is called a concealment."

And applicable section 2563 of the same code (now Insurance Code, section 332) provided:

> "Each party to a contract of insurance must communicate to the other party, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty."

Applying said section 2561, the insured neglected to communicate that which it knew, namely, that within the year preceding the specific inquiry it had

carried public liability and property damage insurance in the Metropolitan Casualty Company and that the frequency of claims and severity of losses had caused that company to refuse to renew such insurance in November, 1933. The insured ought to have communicated those facts to the appellee because a specific inquiry which should have evoked those facts was addressed to the insured. Therefore, the insured was guilty of concealment within the purview of the statute.

Applying said section 2563, the insured knew that frequency of claims and severity of losses had caused the Metropolitan Casualty Company to refuse to renew the public liability and property damage insurance in November, 1933. The insured therefore knew that such matters were material to obtaining insurance of the type sought from the appellee. Such facts were peculiarly ascertainable from the insured. It was therefore the duty of the insured to act in good faith and communicate such facts to the appellee. The insured failed to do so. Therefore, the insured was guilty of concealment within the purview of the statute.

The record is inevitable in its conclusion that the insured was guilty of fraudulent misrepresentations. Applicable section 2579 of the California Civil Code (now Insurance Code, section 358) provided:

> "A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations."

Applying said section 2579, it is plain that the facts fail to correspond with the assertions of the

insured and its agent. The insured's letter of May 5, 1934, is the equivalent of an assertion that within a year, at least, the Maryland Casualty Company and the Madison Insurance Company were the sole carriers of the public liability and property damage insurance of the R. O. Deacon Lumber Company. The said letter is the equivalent of an assertion that claims were infrequent and losses trivial in connection with such type of insurance. The later assertions of the agent for the R. O. Deacon Lumber Company confirmed the assertions of the principal. The facts did not remotely correspond with the assertions. Therefore, the insured was guilty of a false representation within the purview of the statute.

Appellants argue in their brief, however, that the insured's letter of May 5, 1934, was cryptic and subject to several interpretations. (App. Op. Bf. p. 29.) It is enough to cite the case of *Sullivan v. Helbing,* 66 Cal. App. 478 (226 Pac. 803), where it was said at page 483:

> "Though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure (12 R.C.L., 'Fraud and Deceit,' sec. 71).
>
> Fraudulent representations may consist of half-truths calculated to deceive. Thus a representation literally true is actionable if used to create an impression substantially false (26 C.J., p. 1100)."

See, also, *American T. Co. v. California etc. Ins. Co.,* 15 Cal. 2d 42, 65, 98 Pac. 2d 497.

2. THE EVIDENCE SUPPORTS THE FINDING THAT FRAUDULENT MISREPRESENTATIONS AND CONCEALMENT BY THE INSURED INDUCED THE APPELLEE TO ISSUE THE POLICY.

The finding of the trial court on this issue was as follows:

> ". . . had said information been furnished defendant in response to its specific inquiry prior to the issuance of said policy, defendant would not have issued or delivered said policy to said R. O. Deacon Lumber Company; . . ." (Tr. p. 20.)

The finding is supported by the testimony of Mr. Sturgess (Tr. p. 28) and Mr. Haney (Tr. p. 44).

It has been pointed out previously that the foregoing finding was not challenged in the statement of points filed by appellants in respect to the printing of the record on appeal. It was also pointed out that appellants there challenged *the failure* of the trial court to make certain findings, and that no specification of error is addressed to such failure in appellants' opening brief. It may be assumed, however, that a challenge of the quoted finding is submerged in one or more of the specifications of error contained in the said opening brief. If this be true, then the case falls within the rule stated in *Shirreffs v. Alta Canyada Corp.,* 8 Cal. App. 2d 472 (48 Pac. 2d 55), as follows, at page 747:

> "It is obvious that this contention simply amounts to an attack on the trial court's finding that respondents relied on the representation on

the familiar ground of evidentiary nonsupport. The usual rule is therefore applicable and the finding may not be disturbed if the record contains any evidence to support it. Appellant concedes that the testimony of respondents was that they did believe and rely on the representation. This evidence may not be disregarded. The question was one of fact for the trier of facts. The reviewer of the cold record may entertain an opinion that the evidence would have supported a contrary finding. He is not, however, warranted in substituting this opinion in place of a finding made by the trial court from the testimony of witnesses whose conduct and demeanor it was privileged to observe and to weigh. The element of reliance in cases of this character necessarily relates to a state of mind. The task of discovery is difficult for the trial court. It would be more difficult for an appellate court. It is our conclusion that the finding of reliance is not so lacking in evidentiary support that we are justified in overturning it."

3. THE EVIDENCE SUPPORTS THE FINDING THAT FRAUDULENT MISREPRESENTATIONS AND CONCEALMENT BY THE INSURED WERE FIRST DISCOVERED BY THE APPELLEE IN OCTOBER, 1934.

The finding of the trial court on this issue was as follows:

". . . in the month of October, 1934, defendant learned for the first time that the statements and information furnished by said R. O. Deacon Lumber Company preceding said corporation's application to defendant were incorrect and incomplete; . . ." (Tr. p. 20.)

The finding is supported by the testimony of Mr. Sturgess, Mr. Haney, and Mr. Munroe.

Mr. Sturgess said:

> "After the accident in which Mr. Gates lost his life, Mr. Munroe came to Fresno to make an investigation, and it was upon his return that I learned these facts that I have testified to about the Metropolitan." (Tr. p. 28.)
>
> "Prior to the time that Mr. Munroe came back to San Francisco from Fresno the company did not know anything about the Metropolitan Casualty Company being connected with the R. O. Deacon Lumber Company. It was in San Francisco on October 5th, the date on the paper shown to me, or the day previous, October 4th, that I learned of these facts that Mr. Munroe brought back from Fresno to San Francisco." (Tr. pp. 28-29.)

Mr. Haney said:

> "I did not at any time prior to the death of Mr. Gates, which was toward the end of September, 1934, know that the Metropolitan Casualty Company had a long list of losses, both property damage and public liability with R. O. Deacon Lumber Company." (Tr. p. 42.)

And Mr. Munroe said:

> "Prior to the first week of October, 1934, I did not know anything at all about the insurance of the R. O. Deacon Lumber Company, and I heard of an accident in which Mr. Gates lost his life about September 20, 1934. After that happened I went to Fresno and contacted a Mr. Dewey—I believe he was the driver of the truck, and a Mr. Farrar—I think he was the helper.

> . . . After that I came back to San Francisco, but somewhere during my stay up there, I was informed about the Metropolitan Casualty Company being on the risk. I returned to San Francisco right away after learning of the Metropolitan Casualty Company. I came back, I think, the same day. I went over and asked the Metropolitan what their experience had been. I ascertained from their records that they had five property damage claims from the R. O. Deacon Lumber Company in the year 1934. I also ascertained from the records that they had several personal injury claims. When I obtained that information from the Metropolitan Casualty Company, I conveyed it to the head of the department." (Tr. pp. 50-51.)

As previously mentioned, the appellants did not attack the quoted finding in stating their points in connection with the printing of the record. (Tr. pp. 90-91.) The finding was first attacked by Specification of Error No. 1 contained in appellants' opening brief. (App. Op. Bf. p. 6.)

When the said specification is examined, however, it will be found that it is not concerned with the sufficiency of the evidence to support the quoted finding as to discovery, but is concerned with asserted negligence of appellee in failing to make earlier discovery. Appellants rely upon the doctrine of imputed knowledge and claim that under the facts of the case the appellee must be charged with full knowledge concerning the Metropolitan Casualty Company "as of the date of the issuance of the policy". (App. Op. Bf. p. 28.)

Appellants' argument is based upon the contention that the inquiry addressed to the prospective insured was indefinite as to the time to be covered and the particulars to be furnished, that the reply thereto by the prospective insured was indefinite and alarming, and that the appellee was therefore negligent in not investigating and probing the facts until the truth was revealed. (App. Op. Bf. pp. 26-27.) In making their argument, the appellants are wholly unmindful that the letter of the prospective insured in reply to the specific inquiry did not exhaust the information upon which the appellee acted in issuing the policy. After the agent for the prospective insured had received the said reply letter from his principal he again informed the appellee of the favorable experience of the Maryland Casualty Company with the public liability and property damage insurance. When the appellee investigated the experience of the Maryland respecting such insurance, the truth of the information furnished by the said agent was confirmed. And after the receipt of said letter the agent informed the appellee that only the Maryland Casualty Company and the Madison Insurance Company had been the carriers of that insurance for several years previous. These matters were pointed out in the preceding subdivision. There the appellee also pointed out that there was nothing indefinite in the letter of the agent to the principal and nothing indefinite or alarming in the letter of reply from the principal. There the appellee further pointed out that there was no duty on its part to investigate the information volunteered by the prospective insured

as to the unfavorable experience of the Maryland Casualty Company *with collision insurance.*

The law governing the duty to investigate by one to whom representations have been made has been thoroughly expounded in California.

There is no primary duty to investigate and verify statements to the truth of which the other party has deliberately pledged his faith.

> *Teague v. Hall,* 171 Cal. 668, 670, 671, 154 Pac. 851;
>
> *Spreckels v. Gorrill,* 152 Cal. 383, 395, 92 Pac. 1011;
>
> *Dow v. Swain,* 125 Cal. 674, 680-2, 58 Pac. 271;
>
> *Bank of Woodland v. Hiatt,* 58 Cal. 234, 237.

A casual and incomplete investigation will not bar a defrauded party from relief.

> *Rutherford v. Rideout Bank,* 11 Cal. 2d 479, 485, 80 Pac. 2d 978;
>
> *Willson v. Municipal Bond Co.,* 7 Cal. 2d 144, 151, 152, 59 Pac. 2d 974;
>
> *Payne v. Clow,* 114 Cal. App. 597, 600, 601, 300 Pac. 138;
>
> *Conner v. Butler,* 113 Cal. App. 502, 513, 298 Pac. 546;
>
> *Kramer v. Associated Almond Growers,* 111 Cal. App. 595, 599, 295 Pac. 873.

Whether the defrauded party should have investigated is a question of fact for a trial court.

> *West v. Great Western Power Co.,* 36 Cal. App. 2d 403, 97 Pac. 2d 1014;
>
> *Frederick v. Federal Life Ins. Co.,* 13 Cal. App. 2d 585, 588, 589, 57 Pac. 2d 235.

In the *West* case it was said at page 411:

> " 'Whether one has notice of "circumstances sufficient to put a prudent man upon inquiry as to a particular fact", and whether, "by prosecuting such inquiry, he might have learned such fact", are themselves questions of fact to be determined by the jury or the trial court.' (20 Cal. Jur., p. 240.) And, as stated in *Northwestern P. C. Co. v. Atlantic P. C. Co.*, 174 Cal. 308-312: 'Whether a party has notice of "circumstances sufficient to put a prudent man upon inquiry as to a particular fact", and whether "by prosecuting such inquiry, he might have learned such fact" (Civ. Code, sec. 19), are themselves questions of fact to be determined by the jury or trial court. (*Brewster v. Shine*, 42 Cal. 139; *Thompson v. Toland*, 48 Cal. 99; *Renton, Holmes & Co. v. Monnier*, 77 Cal. 449, 456.)' "

And in the *Frederick* case it was said at pages 588 and 589:

> "The fact that they might have overlooked or considered as inconsequential an incorrect or incomplete answer contained in the application does not prevent their defense against fraudulent statement, the falsity of which was discovered after the issuance of the policy. The defendant had no knowledge at the time the policy was issued of the misrepresentations now relied upon to defeat recovery."

The foregoing authorities furnish a complete answer to the cases cited in appellants' opening brief at pages 8 to 22.

Appellants place great reliance on *E. A. Boyd Co. v. United States F. & G. Co.,* 35 Cal. App. 171, 94 Pac. 2d 1046 (App. Op. Bf. pp. 20, 27), but examination of the case will disclose that it offers no parallel. There the insurer defended on the ground that the failure of the insured to inform the insurer of previous embezzlement by an employee, constituted fraud and concealment. There the evidence showed that the same insurer had bonded against the previous embezzlement and that its own records disclosed all the facts concerning the same. In the last analysis it was simply a case of the right hand claiming that it did not know what the left hand had done, and the court very properly held that the defense of fraud and concealment could not be sustained under such circumstances.

It follows, then, that if the points urged by appellants in their Specification of Error No. 1 may be considered on this appeal, the answer thereto is found in the familiar rule that determinations of fact by the trial court are conclusive on appeal.

4. THE EVIDENCE SUPPORTS THE FINDING THAT THE APPELLEE IMMEDIATELY RESCINDED THE INSURANCE AFTER LEARNING THAT IT HAD BEEN DEFRAUDED.

The finding of the trial court on this issue was as follows:

> ". . . upon learning of said concealment of facts for which defendant made specific inquiry and upon which it would have determined whether it would issue the policy applied for, defendant immediately rescinded said policy of insurance and gave notice of rescission thereof to said R.

> O. Deacon Lumber Company together with the reasons therefor, and returned at said time to said R. O. Deacon Lumber Company the premium and all consideration received by defendant from the said R. O. Deacon Lumber Company for said policy." (Tr. p. 21.)

In Specification of Error No. 4 the appellants question the sufficiency of the evidence to support the above finding (App. Op. Bf. p. 7), although no attack upon the finding was made in their statement of points with reference to the printing of the record on appeal (Tr. pp. 90-91).

Appellants do not make an independent argument in connection with said Specification of Error No. 4, but merely refer to their arguments in support of Specification No. 1 as requiring a conclusion that as appellee must be "charged with knowledge as of the time of issuing the policy", it "cannot be heard to claim that it rescinded the policy immediately upon learning of those facts". (App. Op. Bf. pp. 32-33.)

It is therefore obvious that appellants are not questioning the mechanics, or form, or sufficiency of the rescission, but are merely questioning the right of the appellee to rescind the insurance in October, 1934. So far as the factual basis for the above finding is concerned, the testimony of Mr. Sturgess will not permit any doubt as to its sufficiency. (Tr. pp. 28-32.)

The right of an insurer to rescind insurance because of fraudulent misrepresentations and conceal-

ment by the insured, is statutory in California. The applicable sections of the California Civil Code were as follows:

> *Section 2562.* "A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance." (Now, Insurance Code, sec. 331.)
>
> *Section 2580.* "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false." (Now, Insurance Code, sec. 359.)
>
> *Section 2583.* "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract." (Now, Insurance Code, sec. 650.)

"It is an elementary principle of law", said the court in *Fales v. New York Life Ins. Co.,* 128 Cal. App. 201, 209, 17 Pac. 2d 174, "that a false representation or concealment of a mtaerial fact may, in connection with the issuance of a policy of insurance, entitle the party relying thereon to rescind on ascertaining the truth."

There can be no waiver of a right to rescind on the part of an insurer until the insurer becomes aware of the falsity of the representations upon which it acted.

> *Cal.-West States etc. Co. v. Feinstein,* 15 Cal. 2d 412, 422, 101 Pac. 2d 696.

In this case, timeliness of rescission was just another one of the questions of fact upon which the

determination of the trial court is conclusive on appeal.

5. IF THE POLICY OF INSURANCE WAS VITIATED AS TO THE INSURED, THEN THE APPELLANTS COULD NOT RECOVER THEREON.

The legal consequence flowing from the findings of fact is that the insurance was vitiated as to the insured, R. O. Deacon Lumber Company. That being so, it necessarily follows that the appellants could not recover on the policy of insurance.

The governing rule is thus stated in *Emery v. Pacific Employers Ins. Co.,* 8 Cal. 2d 663 (67 Pac. 2d 1046), at page 665:

> "The contention of the defendant insurance company is that the policy is void by reason of false representations contained in the application for insurance and false warranties of the insured in the policy. By statutory provision and similar terms of the policy the right of the injured person who has secured judgment against the insured is to bring an action against the insurer 'on the policy and subject to its terms and limitations.' Hence if the policy is void or voidable as to Bronis (the insured), plaintiffs cannot recover thereon."

The same rule was applied by this court in *Georgia Casualty Co. v. Boyd,* 34 F. 2d 116, where, after holding that the insured was guilty of fraud in failing to disclose to the insurer that prior claims had been made against him, the court said at page 118:

> "The contention most vigorously urged for appellee is that, although the rescission may have operated to cut off any right Dr. Jarvis would

> otherwise have had, as to her it was wholly ineffective for any purpose. Her reasoning is that, under the California statute above quoted, the policy is, in effect, a triparty contract, that her right accrued upon the happening of her injury, and that nothing done thereafter without her consent would operate to divest her of that right. * * *
>
> The manifest purpose of the statute is to give the injured person the same footing the insured would have, had the latter paid the judgment for damages. In the one case, as well as the other, the defense of invalidity is open to the insurer."

And finally, it must be remarked, the judgment in favor of the appellee is not dependent upon the finding that the insurance was rescinded or the conclusion of law to the same effect. It is the settled rule in California "that rescission is not the exclusive remedy but that the insurer may, because of that section (Civil Code, sec. 2562), set up the fraud by way of defense to an action brought to enforce the policy". (*Maggini v. West Coast Life Ins. Co.,* 136 Cal. App. 472, 478, 29 Pac. 2d 263.) The appellee would therefore be entitled to prevail upon its defense of fraud even if any question as to the right of the rescission possessed merit.

CONCLUSION.

The judgment herein is sound in fact and sound in law, and appellee therefore respectfully submits that it should be affirmed.

Dated, San Francisco,
March 21, 1941.

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